In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1482

AUTOHAUS BRUGGER, INC.,
Petitioner,

vs.

SAAB MOTORS, INC., and SAAB-SCANIA OF AMERICA, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on January 18, 1978.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is noted in CCH Trade Regulation Reporter, paragraph No. 61,857, page No. 73,594 (February 13, 1978). A copy

of the opinion is attached hereto as an Appendix. No opinions were issued by the District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered in this case on January 18, 1978. The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Court of Appeals reversed a judgment entered on a jury verdict in favor of petitioner Autohaus Brugger, Inc. (ABI) on the basis of the Court of Appeals' finding of insufficient evidence of a violation of the Dealer's Day In Court Act or of a breach of contract by the respondent.

The evidence established to the satisfaction of the jury that Respondent Saab-Scania of America, Inc., an automobile manufacturer, terminated petitioner automobile dealer's franchise by one or more of the following means, found to be coercive and in violation of the manufacturer's obligation to deal in good faith under the statute and under the contract:

A. Saab attempted to require ABI to inflate its inventory, beyond Saab's stated inventory level requirements, and to purchase automobiles which ABI admittedly did not need, upon threat of termination of the franchise;

B. Saab established an admittedly arbitrary annual sales objective for ABI, which ABI failed

to meet, and which Saab claimed as the basis for non-renewal of the franchise;

C. Saab attempted to coerce ABI to drop warranty claims which Saab admitted owing and which were never paid;

D. Saab required ABI, under Saab's "pilot scheme", to hold its warranty claims for prior approval by Saab's service representative, contrary to Saab's standard procedure, and threatened to place ABI on C.O.D.;

E. During the term of the contract, Saab failed to ship parts to ABI, failed to reimburse ABI for advertising, failed to reimburse ABI for its warranty claims, and failed to fill ABI's order for 1973 Saabs. Upon termination of the franchise, Saab failed to purchase or pay for remaining parts and automobiles, in breach of the contract.

The decision of the Court of Appeals raises the following questions:

A. Can any of the foregoing acts constitute a violation of Saab's duty of good faith under the Dealer's Day In Court Act or under the contract?

B. If such acts can constitute a violation, was there sufficient evidence to sustain the jury's verdict of liability and damages?

C. Should the issue of good faith be determined by inferences drawn from the evidence

and derived from the jury's subjective analysis of the facts, as determined by the Fifth Circuit Court of Appeals in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corporation*, 447 F.2d 786 (5th Cir. 1971), the Seventh Circuit Court of Appeals in *Shor-Line Rambler, Inc. v. American Motors Sales Corp.*, 543 F.2d 601 (7th Cir. 1976) and the Tenth Circuit Court of Appeals in *American Motor Sales Corporation v. Semke*, 384 F.2d 192 (10th Cir. 1967)?

D. Did the Court of Appeals, in overturning the jury's verdict, improperly rely upon the testimony of defense witnesses whose testimony was rebutted, and whose credibility is a principal issue in the case?

E. Did the Court of Appeals, in overturning the jury's verdict on the ground of insufficient evidence, usurp the function of the jury and deny petitioner's constitutional right to trial by jury, by failing to consider the evidence in a light most favorable to petitioner, and by failing to give petitioner the benefit of all reasonable inferences from the evidence so considered?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions involved in this case are the Dealer's Day In Court Act, Title 15, U.S.C.A. Sections 1221-1225 and the Seventh

Amendment to the United States Constitution. The statute provides in pertinent part:

> "1221(e) The term 'good faith' shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

> "§ 1222. Authorization of suits against Manufacturers; amount of recovery; defenses

> An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith."

STATEMENT

Petitioner Autohaus Brugger, Inc. ("ABI") is an automobile dealership which began selling and servicing Mercedes Benz automobiles in 1965 in Palo Alto, California. In 1968, ABI built another store in Redwood City, California. In April 1969, ABI executed the first of several franchise agreements with respondent Saab Motors, Inc., the predecessor in interest of respondent Saab-Scania of America, Inc. (Respondents hereinafter are referred to collectively as "Saab").

A. SAAB'S FRANCHISE AGREEMENTS

ABI executed separate agreements for its Palo Alto and Redwood City stores, and during 1971 executed additional franchise agreements for the same locations between October and December. (Plaintiff's Exhibits[1] 173, 243, 169, and 282; Reporter's Transcript[2] 64:6-10, 23-25; 68:19; 69:9).

Saab's agreement states the following concerning warranties:

> ". . . company agrees that it will be responsible for handling the 'warranty'. Dealer agrees to install new parts or to replace defective parts without charge to the original purchaser. Reimbursement for such defective parts will be made by company to dealer without cost to the latter. (PX 166, p. 4, ¶14).

As part of the franchise, Saab attached its sales policy, the purpose of which was stated as follows on page 1:

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[1]Hereinafter referred to as "PX", defendant's exhibits as "DX".
[2]Hereinafter "RT".

> ". . . to establish policies of Saab which pertain to our dealers, to serve as a guide for our mutual benefit in achieving the above stated objectives, *and to augment the franchise agreement*" (PX 166; emphasis added).

Saab stated its franchise objectives to be:

> ". . . to provide our dealer organization with: (a) prompt availability of automobiles and spare parts; (b) assistance in selling and servicing Saab automobiles, in order that they may carry out their part of our marketing program; (PX 166; RT 19:23-20:3).

Regarding the importance of service, the policy states:

> ". . . because of the unique design characteristics of the Saab automobile, Saab Motors recognizes the seriousness of each dealer providing adequate and efficient service to owners . . . Likewise, achievement of our sales objective will be seriously weakened, if dealers do not recognize their responsibility for providing such services" (PX 166, Sales Policy, p. 4).

For handling of dealer warranty claims from Saab, the objective states:

> "Saab Motors recognizes that to achieve its sales objective, strong factory and distributor support of its automobiles by the warranty program is necessary . . ." (PX 166, Saab Sales Policy, p. 5).

Mr. Brugger, President of ABI, testified that he relied on Saab's statements in entering into the Saab franchise agreements (RT 18:11-23:8).

In 1971, ABI executed several apparently overlapping franchises with Saab. In February, ABI's predecessor executed a franchise for the Palo Alto store (PX 167); in September, ABI executed a franchise for the Burlingame store (PX 281, RT 64:23-5); executed two franchise agreements in October for Palo Alto (PX 173, PX 243; RT 64:6-10), and again in October for Burlingame (PX 169; RT 64:23-5); and in December another franchise agreement for Palo Alto (PX 282; RT 68:19-69:4).

Mr. Brugger testified that he did not understand the need for so many identical franchises, that he asked Saab why he should execute so many duplicate franchises and that Saab did not provide an answer (RT 64:14-65:25). As a result of this confusion, neither Saab nor ABI knew which franchise agreement was operative for which store.

This was the context in which renewal of the franchise arose later in 1972. The agreements expired according to their terms on September 30, 1972. The parties treated the agreement as continuing thereafter, and Brugger expressed his desire to renew in October and November. In December, Saab announced that the franchise would not be renewed.

B. RELATIONS BETWEEN THE PARTIES IN 1972

Since execution of its first franchise, the evidence showed that ABI had serious problems with Saab over various matters including Saab's failure to reimburse ABI for certain advertising expenses and warranty work performed by ABI (RT 523:7-524:3; 32:21-38:1; 74:12-75:4; 759:23-762:9; PX's 87, 196, 245, 260, 284); Saab's unrealistic and incomplete flat rate manual (a book specifying time that various repairs should take and which was used by Saab to determine the amount of reimbursement to which ABI was entitled for warranty work) (RT 1087:12-1094:17); as well as Saab's poor parts and service systems. These deficiencies, according to the evidence, impaired ABI's customer relations (RT 78:14-79:20). Saab acknowledged at least some responsibility for these problems (PX 14; RT 99:11-100:13; RT 700:17-701:2; 759:23-762:9; 722:1-723:15; 734:23-735:20; 739:7-740:10).

As noted below, Saab engaged in various breaches of its obligation of good faith throughout the year 1972. ABI nevertheless sought to renew the franchise agreement.

In the introduction to its opinion, the Court of Appeals goes straight into the resolution of conflicting evidence and finds that "there is convincing unrebutted evidence in the record to show that Saab tried repeatedly to get ABI to renew [the franchise]." (Appendix, p. iii). The Court goes on to cite all of the testimony supporting Saab's version of the dispute, relying principally on Michael Long, Saab's district manager, and overlooks the weight of the evidence.

Mr. Long's claim that he offered a renewal of the franchise to Mr. Brugger on August 24, 1972, is belied by the fact that his dealer contact report for

that date (filled out in order to inform his superiors, contemporaneously with the events) says nothing at all about the alleged offer and refusal of a franchise renewal (PX 101). The Court wholly ignores Brugger's testimony that he wanted to be a Saab dealer in August and September of 1972 (RT 456) and he awaited the usual procedures to be commenced by the manufacturer (RT 461). Brugger testified that he wanted very much to be a Saab dealer, despite all of the problems (RT 314) and explained his reasons at trial (RT 317-318). He specifically told Boli that he wanted to be a Saab dealer in a meeting in October (RT 464). Saab did not offer a dealer agreement for his signature (RT 465). Brugger had instructed Charles Grelle to seek renewal of the franchise agreements on his visit to the Saab Dealer Meeting in Southern California in November 1972 (PX 290; RT 465-466; 551:15-554:13; 581). The jury had ample opportunity to observe the testimony of Mr. Brugger and Mr. Long, and to consider the circumstantial evidence such as Long's failure to mention any offer of a franchise renewal in his dealer contact reports. They concluded that Brugger did want renewal, and Saab did not. There is no basis for reversing the jury's determination in this case.

In furtherance of its efforts to retain the franchise, in November 1972, ABI ordered fourteen Model 1973 Saab automobiles (PX 113; RT 334). At trial, Saab questioned Brugger's sincerity. The Court of Appeals resolved the question of Brugger's good faith as follows:

> "*Hubert Brugger testified that his order was a serious good faith order.* However, a review of Peter Widdershoven's testimony indicates that Brugger's order was not a good faith order, but instead was merely a method to find out where Autohaus stood as a dealer for Saab." (Appendix, page xxvii; emphasis added).

In this instance, the Court plainly admits to resolving a conflict in testimony which can only be based on the credibility of the witnesses. This is solely the function of the jury, and the Court's intrusion into this determination is wholly unjustified.

1. Saab Attempted To Require ABI To Inflate Its Inventory Beyond Saab's Own Inventory Level Requirements, And To Purchase Automobiles Which ABI Admittedly Did Not Need, Upon An Implied Threat Of Termination.

Saab's district manager Michael Long testified that during the summer of 1972 he had "a lot of cars to sell" to the dealers in his district, he was "pushing" them more than usual, and tried to sell them to Autohaus Brugger regardless of the adequacy of ABI's inventory (RT 1232:18-1233:5). Saab's own policy called for an inventory equivalent to a 45 day supply (RT 644:6-25). Mr. Long was apparently unaware of the company policy and felt that a dealer should have on hand a 60 day supply (RT 1225:19-24). The supply is measured by sales: thus, if one month's sales equal ten units, then twenty units on hand constitute a two month supply.

Whichever standard is applied to ABI's inventory during the summer of 1972, the evidence is clear that

it was more than adequate. ABI's inventory in July included 28 Saabs, while sales in July amounted to 11 units; for August, the sales were 6, the inventory 21 units (PX 287, DXBP, RT 1228, 1230). In each case, substantially more than a two month supply was on hand.

Long nevertheless pressed for more sales (RT 1232:18-1233:5).

Long visited ABI on August 24, and reported to his superiors as follows:

> "Mr. Brugger gave an ultimatum that Saab pay his request for warranty claims—or else. *He refused to order cars to bring his inventory up to a satisfactory level. He will not voluntarily terminate and he will not cooperate.*" (PX 101; emphasis added).

This report, a contemporaneous business record, plainly gives rise to the inference that Long was telling Brugger to order more cars and that the alternative was termination. Long's testimony at trial further supports this inference:

> "*Mr. Brugger, I mean that he would not voluntarily terminate.* Mr. Brugger refused to sign a selling agreement, *he refused to buy cars.* He was twenty-five percent of my business and he was putting me out of business. I said 'would you sign the selling agreement?' He refused. *I said 'will you terminate so I can get somebody that will do the job?'* It was just that simple." (RT 1673-74).

The jury was by no means obliged to believe Long's claim that he had offered a selling agreement. The

dealer contact report makes no reference to any offer of a selling agreement. Surely the jury is entitled to infer that Mr. Long would not have omitted an important event if it had actually happened. Brugger testified that nobody from Saab, through the end of September 1972, ever asked him to sign a new franchise agreement (RT 456:6-9). The jury was faced with a clear conflict in the evidence, to be decided on the basis of the credibility of the witnesses and circumstantial evidence.

The jury was entitled to believe the underlined portions of Long's dealer contact report, reinforced by the testimony of Long as quoted above, and to disbelieve Long's other statements.

This was Saab's first attempt to terminate Brugger's franchise. The attempt was clearly made in the context of Brugger's refusal to order additional cars, beyond what was concededly an adequate inventory in terms of Saab's company policy and even in terms of Long's personal requirements. There can be no doubt that this kind of attempted coercion constitutes bad faith under the statute:

> "[T]he existence of coercion or intimidation depends upon circumstances arising in each particular case and may be inferred from a course of conduct. For example, manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation . . ." (H.Rep. No. 2850, 84th Congress, 2nd Session (1956),

cited in *Rea v. Ford*, 497 F.2d 577, 585, n.13 (10 Cir. 1974), cert. denied, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 106.

The Congressional statement of purpose was cited with approval by the Second Circuit Court of Appeals in holding that a manufacturer which requires a dealer to maintain a large inventory is "particularly suspect" of violating the statute. *Autowest v. Peugeot, Inc.*, 434 F.2d 556 (2d Cir. 1970).

The Ninth Circuit's treatment of this evidence and its relation to the statute cannot withstand analysis. The Court stated that it could not find, from its review of the evidence, any coercion in Long's attempt to sell Autohaus cars, and finds that Long's attempts to solicit orders were nothing more than "recommendation, endorsement, exposition, persuasion, urging, or argument normal in competitive commercial relationships" (Appendix, p. xxvi). This treatment by the lower court amounts to nothing more than a rereading of the evidence, to edit out that which supports petitioner's contentions and to enhance everything which supports the respondent. Long admitted at trial that he asked Brugger to *terminate,* and the Ninth Circuit is unable to see the coercion or the attempted coercion in that act, and finds it to be the sort of persuasion permitted under the statute. This finding cannot be squared with the facts or the clear meaning of the statute.

The lower court also fails to see the causal connection between the coercion and something which Autohaus had a right not to do. Autohaus clearly had a

right not to order additional cars. Saab clearly attempted to coerce Autohaus to do just that.

The Ninth Circuit does not comment on the statute's express prohibition against *attempted* coercion, nor does it refer to Long's dealer contact report or his express admission that he asked Brugger to terminate. This provision of the statute, and these items of evidence, are critical to the determination of liability and were properly considered by the jury. The violation of the statute could not be more plain, and the Ninth Circuit's reversal on this point is clear error.

2. Saab Established An Admittedly Arbitrary Annual Sales Objective For ABI, Which ABI Failed To Meet, And Which Saab Claimed As The Basis For Termination.

Saab's stated excuse for nonrenewal of ABI's franchise was set forth in the termination letter of December 20, 1972 sent to ABI by Saab's national sales manager, W. Donald Carmack:

> "The reason for our decision concerns your *inability to sell the number of Saab automobiles* that both of us have *projected* as the reasonable amount given the population, affluence and other factors connected with the areas in which you have been operating." (PX 115; emphasis added).

The projected number referred to by Carmack was the so-called annual sales objective or ASO (RT 1763-1764). ABI's annual sales objective had been set at 120 units (PX 7). Mr. Long admitted that the annual sales objective was a performance goal and

not customarily treated as a requirement (RT 1354:14-22, 1355:12-19). He stated that the annual sales objective had no factual backing, and was nothing more than speculation or a "guesstimate." (RT 1356:18-1357:3). The annual sales objective, once established, was never changed, either from year to year or during the course of the year (RT 1354:1-17). Long was not aware of any use whatsoever of the annual sales objective (RT 1354:23-1355:10), other than as a guide or goal.

Only one or two dealers of the fifteen in Mr. Long's district met their annual sales objective in 1972 (RT 1717:5-9). Most of the dealers in the San Francisco Bay Area sold substantially fewer cars than their ASO (RT 1720:2-22). Only one other dealer in Mr. Long's district was terminated in 1972 (RT 1818:25-1819:10).

Nevertheless, the ASO was the standard to which ABI was held on pain of termination of the franchise.

Judged by any other measure, ABI's sales performance was excellent. ABI sold 97 vehicles in 1972, which placed it third out of 15 dealers in its district (RT 1203:21-1204:6). ABI's sales were more than double the nationwide average for Saab dealers of 41 cars in 1972 (PX 296).

Saab's intended measure of performance, for all but ABI, was not the annual sales objective but rather a minimum of 25 units per year. This policy was developed in 1972, and Mr. Carmack and his superiors determined that sales of fewer than 25 units per year rendered a dealership unprofitable for the dealer and unacceptable to Saab (RT 692:9-693:16). The 25-unit standard was far more than a guideline or a goal, and in fact if a dealer failed to reach 25 units per year, Saab recommended that he terminate (RT 1709:19-1710:19). ABI's sales placed it substantially above the level regarded as acceptable for other dealers.

By its use of a double standard, and by setting an arbitrarily high annual sales objective, which few of its dealers were able to meet, Saab retained an ever-ready excuse for termination. This practice was condemned by the Court in *Madsen v. Chrysler Corp.*, 261 F.Supp. 488 (N.D. Ill. 1966), vacated as moot, 375 F.2d 773 (7th Cir. 1967). In that case the Court found that an arbitrary performance standard could not form the basis of a valid notice of termination:

> "[W]e conclude that MSR [minimum sales requirement] calculated simply as provided in the Chrysler dealership agreements without adjustment for the various factors herein discussed and which results at all times in a substantial number of dealers being in technical default, is an *arbitrary, coercive* and unfair provision since it would enable Chrysler to terminate roughly one-third to one-half of its dealerships at any time." (261 F.Supp. at 506; emphasis added).

The Court went on to find that the termination, based upon failure to achieve MSR, constituted a violation of the Dealer Act. *Id.*

The vice of an arbitrarily high annual sales objective is that it gives the manufacturer an excuse for termination or non-renewal where such an act is otherwise unjustified. The arbitrary sales objective gives the manufacturer the very weapon against which Congress sought to provide a shield for the dealer in the Dealer's Day In Court Act.

The ruling of the Court of Appeals on this issue in this case is based upon several findings of fact arising from conflicting evidence, directly contrary to the jury's findings. The Court finds that: "Saab and Autohaus agreed that as a 12 months sales objective, Autohaus would try to sell 120 units." (Appendix, p. xxiii). This ignores Brugger's testimony that *Saab* established the goal of 120 units (RT 61). Moreover, the Court fails altogether to account for Saab's admission of the arbitrariness of an ASO which was nothing more than a "guesstimate."

The opinion below correctly notes that a violation of the statute may occur when the manufacturer sets an unrealistic goal (which none of its dealers can meet) and then selectively terminates one dealer for failure to meet that goal (Appendix, page xxiii, citing *Madsen v. Chrysler Corp., supra*). As noted above, that is precisely what happened in this case. The Court wholly ignores the evidence and offers a finding that:

> "[F]irst, Saab did not use as grounds for the non-renewal of the franchise the fact that Autohaus had not sold the 120 cars. Rather, Saab did not renew the franchise because of Saab's analysis of Autohaus' selling performance which, as we have discussed, *supra*, was not very good." (Appendix A, page xxiv).

The evidence that Carmack's letter of termination was based upon the 120 unit ASO is uncontroverted. Carmack's letter squarely bases the decision on ABI's ". . . inability to sell *the number of Saab automobiles* that both of us had *projected* . . ." The only sales projection by anyone was the ASO (PX 7; RT 1763-64; emphasis added). On its face, the ASO appeared to have been "projected by both [ABI and Saab]," in the terms of Carmack's letter, although Brugger testified that the number had been established by Saab. The number specified was 120 units (PX 7).

The Court's finding that Autohaus' selling performance "was not very good" is similarly unsupported by the evidence. As noted above, Autohaus was performing at a rate better than twice the national average, and was in the top twenty percent of dealers in Mr. Long's district. In fact, Saab cited ABI on November 1, 1972 (a month after the expiration of the franchise date and six weeks before the termination) as one of the "top Saab dealers" in a national program (RT 351).

The Court of Appeals also finds no evidence that the annual sales objective was used to coerce ABI. First, the Court ignores the letter of September 14, 1972 from Saab's western regional manager, Mark Boli, to Hubert Brugger (PX 105). The principal subject of the letter is the warranty claims which

continued to be disputed. The objective of the letter was plainly to coerce Brugger to reduce his warranty claims. Boli concludes the letter with a complaint about "low sales volume" and tells Brugger "to correct this problem immediately and start moving forward in sales . . ." Secondly, Saab claimed that the ASO was the basis of the termination itself, the ultimate act of coercion. Certainly the jury was entitled to infer from this precisely what the Court of Appeals refused to see.

3. Saab Attempted To Coerce ABI To Drop Its Warranty Claims, Which Saab Admitted To Be Owing And Which Were Never Paid.

The Court of Appeals devotes the bulk of its review of the evidence to consideration of the warranty dispute which extended through the year 1972 and even beyond the termination. The jury reviewed dozens of inconsistent documents and heard hours of conflicting testimony on the subject, and concluded that Saab wrongly attempted to coerce ABI to drop its warranty claims.

The Court of Appeals, in its review of the evidence, simply rejects the inferences drawn by the jury and wholly ignores other evidence.

Autohaus Brugger kept track of warranty claims in a warranty claims register (PX 196). This register was explained at great length. The Court of Appeals finds that the warranty claims register showed a claim as owing, even if Saab had rejected the claim and the rejection was proper. This conclusion flies in the face of the testimony of the bookkeeper, who stated that all rejections by Saab were noted in the register, and that where ABI agreed that the rejection was proper, credit was given (RT 1493-1494).

The Court points out that ABI submitted certain claims calling for reimbursement for, *e.g.*, 4½ hours labor on a repair for which Saab's "flat rate manual" allowed 3 hours. Saab admitted that the flat rate manual provided insufficient times for certain jobs (RT 734:23-735:20) and allowed adjustments in some cases and disallowed them in others (RT 1100:21-1101:22). Such adjustments were discussed by the parties in their continuing dialogue on the subject of warranty reimbursement during 1972.

One noteworthy aspect of this dialogue is Saab's failure to offer its own contemporaneous, regularly-kept business record of ABI's warranty account. Nor did Saab offer any proof of payment of the claims it admitted owing.

The Court of Appeals finds that most of ABI's claims, if not all, were improper (Appendix, p. vi). No evidence is cited for this proposition, and Saab's clear admissions of liability are ignored.

Saab admitted owing more than $5,000.00 on warranty claims as of September 14, 1972 (PX 105). Some of the ABI warranty claims had gone unpaid for a year (PX 196) and Saab never offered any proof that even the $5,000.00 admittedly owed had been paid.

On the contrary, at least some part of the admittedly owed warranty claims went unpaid, not only through the end of 1972, but to this day.

Petitioner offered in evidence the following interrogatory and answer:

Interrogatory No. 69:

What amount, if any, is currently owed by Saab to plaintiff in connection with any matter whatsoever, *including amounts owed in connection with warranty claims made by plaintiff?*

Answer:

$2,905.58 (RT 939; emphasis added).

Saab's failure to explain or qualify its answer clearly gives rise to the inference that it admits owing this amount on warranty claims as of the date of trial. The Court of Appeals refuses to draw this inference, and purports to derive support for a contrary interpretation from other Saab interrogatory answers, which were neither offered nor accepted in evidence (Appendix, p. xii, n.4).

Other interrogatory answers which were admitted in evidence support petitioner's interpretation, and acknowledge that the debt is based in part on "the amounts due for warranty work." (RT 1668).

Failing to acknowledge this evidence, the Court of Appeals finds that the acknowledged debt was based upon the "normal expenses which Saab would incur when winding up a franchise arrangement such as that with Autohaus." (Appendix, page xii). Despite Saab's admissions, the Court goes on to find that no warranty monies were due (in direct contravention

of the evidence) and therefore the warranty claims could not have been used to coerce ABI (Appendix, pages xii-xiii).

Mr. Grelle, on behalf of ABI, and Mr. Soane, Saab's national service manager, reviewed all of the available evidence in connection with the warranty dispute, and agreed upon a compromise which they recommended to their principals (RT 1398-1402). Brugger agreed to accept the Grelle-Soane recommendations, and Boli rejected the proposal (RT 1404-1408; PX 216; RT 1425-1426).

The fact that ABI was willing to follow the procedure proposed by Saab's national service manager is substantial evidence of ABI's good faith in the matter. Conversely, Saab's rejection of the proposal shows bad faith.

Even as of March 1973, some of the claims making up the $5,000.00 admittedly owed had not been paid, which claims had arisen before June 1, 1972 (RT 1436-1437).

The Court of Appeals quotes Charles Grelle as testifying that "as far as he knew there was *no* claim which Saab admitted it owed which had never been paid (RT 1391)" (Appendix, p. x; emphasis added by Court).

What Grelle said was that he could not identify a *specific* unpaid claim (RT 1391:11-13):

> "Q. As you are sitting here today, can you point to any given claim that you and Mr. Soane analyzed, that Mr. Soane said payment was due and owing on, where payment hasn't been made?

A. Not on any specific claim. I don't remember any."

He testified, however, that some $2,647.92 in claims were still unpaid as of his most recent review of the situation in March, 1973 (RT 1437-1440). The court's re-reading of the evidence is simply unjustified.

Brugger had made his plea for payment of the warranty claims early and often throughout 1972. Saab's response was to threaten to place him on C.O.D. and to impose a "pilot scheme" for the handling of warranty claims.

4. Saab's "Pilot Scheme" Required ABI To Hold Its Warranty Claims For Prior Approval By Saab's Service Representative, Contrary To Saab's Standard Procedure; Saab Threatened To Place ABI On C.O.D.

In June 1972, Saab imposed its "pilot scheme" on ABI's Palo Alto store (PX 74). Mr. Coyne, Saab's national service manager, testified that dealers were placed on the pilot scheme if their warranty claims were "high cost" (RT 763:1-764:2). Under this scheme, the dealer had to hold its warranty claims for prior approval by a Saab service representative. Only eight to ten dealers out of the entire western region were subjected to this program (RT 955:24-956:2).

The jury properly concluded that the "pilot scheme" was unjustified in the case of ABI, particularly in view of the fact that Saab admitted that valid warranty claims had gone unpaid for months and even years. The pilot scheme was clearly imposed to reduce ABI's warranty claims, and under the circumstances was coercive.

The Court of Appeals dismisses this claim, based upon its finding of fact (again, contrary to the jury's) that it was justified.

On several occasions Saab threatened to place ABI on a C.O.D. status, even though ABI had a *credit* balance with Saab (PX 75, 76, 99, 100; RT 272:8-274:5; 318:11-320:6; 613:21-614:8, 623:14-625:21). Saab's national sales manager admitted that under the circumstances Saab should not have contemplated termination of ABI's credit (RT 704:13-705:9).

The consequences of C.O.D. status are dire indeed. Mr. Brugger testified that a manufacturer would put a dealer on C.O.D. only if it wanted to "get rid of him because they know he will be dead in his community." (RT 319:23-320:2). Brugger testified that it would be very bad for the dealer's reputation in the business community, having an effect on the line of credit, the banker, other suppliers and other manufacturers (RT 149:20-21, 150:8-9).

The Court of Appeals once again fails to acknowledge the evidence. Moreover, it fails to find any causal connection between the threat and some action which Autohaus would be coerced to take in the alternative (Appendix, page xxvi).

The Court of Appeals' treatment of various specific instances of implied threats, each one in isolation, fails to give effect to the law's condemnation of a coercive *course of conduct*. The "pilot scheme" and

the C.O.D. threat were consistent with the overall course of conduct employed by Saab in attempting to force ABI to drop its warranty claims and to purchase beyond the usual inventory requirements. Other circuits have recognized a similar course of conduct to be coercive under the statute.

In *American Motor Sales Corporation v. Semke,* 384 F.2d 192 (10th Cir. 1967), the Court ruled that evidence relating to the refusal of an automobile manufacturer to honor and/or credit the franchised dealer with services performed under the warranty arrangements of the franchise agreement was for the jury to consider in determining whether the manufacturer's overall course of conduct with the dealer was coercive under the Dealer's Day In Court Act. In examining the conflicting claims regarding the warranty work, the Court took note of the support in the legislative history for permitting the jury to infer the existence of coercion or intimidation from a manufacturer's course of conduct:

> "However, it would seem proper for the jury to consider what transpired between Semke and Mr. Irwin, regarding the warranty work to be done on the cars in determining the appellant's overall course of conduct with Semke. It should be noted that the legislative history states that 'The existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct.' See U.S. Code, Congressional and Administrative News 1956, p. 4603."
>
> *American Motor Sales Corporation v. Semke,* 384 F.2d at 197-198.

Recognizing the conflict in the evidence, the Court of Appeals for the Tenth Circuit ruled that the dealer's evidence on the warranty issue was sufficient to support the jury's verdict of a violation of the Dealer's Day In Court Act. 384 F.2d at 198.

The Ninth Circuit apparently would require an express threat (as opposed to implied threat) and a completed act of successful coercion (as opposed to attempted or threatened coercion). This is inconsistent with the rule followed in other circuits, and inconsistent with the purpose of the statute.

5. During The Term Of The Contract, Respondent Failed To Ship Parts To Petitioner, Failed To Reimburse Petitioner For Advertising, Failed To Reimburse Petitioner For Its Warranties, And Failed To Fill Petitioner's Order For 1973 Saabs

Upon termination of the franchise, Saab failed to purchase or pay for remaining parts or automobiles, all in breach of the contract. In addition to specific obligations, the contract imposes an obligation to deal in good faith. *Milton v. Hudson Sales Corp.,* 152 Cal. App.2d 427, 313 P.2d 936 (Cal. 1957).

The evidence plainly pointed to a number of breaches of the franchise agreement, all occurring before September 30, 1972, which Saab takes to be the date of expiration of the agreement. Saab frequently failed to deliver parts which had been ordered and were urgently needed (RT 245:2-246:22; 1025:10-1026:13; 1021:2-1022:13; 1085:13-1086:7). Saab frequently cancelled ABI's back orders for parts without informing ABI (RT 1022:14-1023:18). All of these practices were in breach of the well-established

practice of the automobile industry (RT 1023:14-1024:5).

Similarly, Saab was continuously late in its reimbursements to ABI for advertising and sometimes did not reimburse ABI at all (RT 265:14-266:11). The evidence demonstrated the damage inflicted by this breach on ABI's new car business (RT 247:25-249:17).

While the franchise agreements expired, according to their terms, on September 30, 1972, the parties plainly treated them as extending beyond that date. There had been multiple franchise agreements signed for the year 1972, and therefore the need for signing another one would have been by no means apparent. ABI continued to purchase cars from Saab, sell them to the public, purchase parts from Saab, perform warranty repairs, and do all the other things which it did under the agreements. Saab continued to send dealer mailings and bulletins to ABI (RT 944:19-22, 333:16-21, 937:23-938:6; 333:20-25, 368:24-369:11, PX 189). On November 1, 1972, more than a month after the purported expiration of the agreements), Saab listed ABI as one of its best overseas delivery dealers (PX 146; RT 351:10-19), and invited ABI to Saab's dealer meeting on November 30, 1972 (RT 1424:3-14).

Saab issued a "cancellation bulletin" to announce the end of the agreement (PX 117) and so informed the California Department of Motor Vehicles (PX 121). In both instances Saab identified the effective date of cancellation as December 20, 1972 (RT 374:

22-375:2). Saab's national sales manager also identified the effective date of the end of the agreement as December 20, 1972:

> "While the appropriate date for their effectiveness [of the provisions relating to termination] would otherwise be October 1, 1972, *in view of the apparent confusion relating to the status of the selling agreements* the appropriate date to be utilized in connection with those paragraphs should be the date of this letter." (PX 115).

It is well settled that when an agreement expires by its own terms, if, without more, the parties continue to perform as before, an implication arises that they have mutually assented to a new contract containing the same provisions as the old. *Martin v. Campanano*, 156 F.2d 127 (2nd Cir. 1946); *cert. denied* 67 S.Ct. 112 (1946).

Under these circumstances, the question of whether the franchise was intended to be extended was properly left to the determination of the jury. They concluded that the agreement was extended, and that the acts noted above constituted breaches of the agreement.

The non-renewal of the agreement itself can be traced to Saab's admitted breaches of the contract. That is, but for Saab's breaches of contract, the agreement clearly would have been renewed. Each of the acts analyzed above in terms of the Dealer's Day In Court Act also constitutes a breach of the implied term of good faith in the contract itself. The jury was entitled to conclude that if Saab had not

committed any of the breaches of good faith, the relationship of the parties would have continued as before. Both Long and Boli testified on behalf of Saab that they wanted to renew the agreement with Brugger, at least until October 19, at which time Boli says that a franchise agreement to be offered to Brugger was contained in Long's briefcase and may have been put on the table at a meeting with Brugger (RT 1827-1832). Mr. Boli implied that the agreements would have been signed if warranty claims and advertising claims had been settled (RT 1831-1832).

Since the events which caused the failure to renew the agreement were also breaches of contract by Saab, the verdict must prevail on that theory as well. Moreover, since these breaches occurred before September 30th as well as after that date, the finding of an extension of the franchise agreements is unnecessary to support the verdict.

With respect to damages, the Court of Appeals notes parenthetically that it finds the evidence "wholly insufficient to support the award of $200,000.00." (Appendix, p. ii, n.1). No further explanation is offered. Since no error in the admission of evidence was found, the question becomes whether there was evidence to support the jury's award in that amount.

ABI proved a loss of $3,400.00 by reason of Saab's failure to purchase leftover parts after the termination (RT 1044:7-17; 1046:7-19; 1047:1-5 and 1048:3-14) and $5,226.00 for the refusal to purchase new Saab automobiles at the end of the franchise (RT 449, 1498, PX 253). Additionally, the warranty claims

register showed a debt of $8,430.00 (PX 196). As noted above, Saab admitted a debt of approximately $2,900.00 in its interrogatory answers, and had admitted in correspondence that more than $5,000.00 in warranty claims had been unpaid.

The termination also resulted in lost profits due to lost sales for at least the three-year term of the franchise, which became Saab's standard term in 1972.

With respect to lost profits, four factors enter into the computation. Each of the factors was considered by a qualified expert, and each was based upon substantial evidence. The four factors were as follows:

a. Projected sales of 160 new Saabs per year. This figure was established on the basis of Mr. Brugger's estimate (RT 985-986), the expert's agreement (RT 786), and the actual experience of ABI's successor in the Palo Alto area (RT 919);

b. A gross profit per new vehicle of $500.00 was established by Saab's own advertisements (PX 194) and Saab's regional manager's testimony to the effect that the gross profit per vehicle was $575.00-$650.00 (RT 645-646);

c. A multiplier was applied to the $500.00 gross profit per new vehicle to derive gross profits from used cars plus service and parts. Plaintiff's expert based this upon (1) a National Automobile Dealer's Association study, which showed that 2.14 was an average multiplier (RT 794), (2) the experience of comparable dealers (a multiplier of 2.04), and (3) ABI's historical experience

(a multiplier of 1.86) (RT 795). This evidence would plainly justify the use of a multiplier of 2.0;

d. The expert testified that a gross profit to net profit of 2.55 to 1 was reasonable in terms of ABI's experience and the experience of comparable dealers included in the expert's study (RT 794).

Multiplying these four factors results in a lost profit figure of nearly $63,000 per year or about $188,000 over a three year period. When added to the out-of-pocket damages noted above, this more than justifies the verdict of $200,000.00.

The verdict was plainly proper under the decisions of other circuit courts concerning damages under the statute. *Randy's Studebaker Sales v. Nissan Motor Corp.,* 533 F.2d 510 (10th Cir. 1976); *Autowest v. Peugeot, Inc.,* 434 F.2d 556 (2d Cir. 1970); *American Motor Sales Corp. v. Semke,* 384 F.2d 192 (10th Cir. 1967).

REASONS FOR GRANTING THE WRIT

1. **THE DECISION OF THE COURT BELOW IS IN SUBSTANTIAL CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS AND WITH CONGRESSIONAL INTENT FOR A STATUTE NOT HERETOFORE REVIEWED BY THE SUPREME COURT.**

This Court has not yet reviewed a case arising under the Dealer's Day In Court Act. The statute was characterized by Congress as necessary to remedy "the manifest disparity in the ability of franchised dealers [of automotive vehicles] . . . to bargain with

their manufacturers." United States Code, Congressional and Administrative News, 84th Congress, 2nd Session (1956), Volume 3, pp. 4596-97. Quoted in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.,* 447 F.2d 786 (5th Cir. 1971), at 793, n.7.

The statute deals with the obligation of good faith, which is imposed in terms of a strict dichotomy. It prohibits coercion, intimidation, or threats of coercion or intimidation in connection with performing, terminating or renewing an automobile dealer's franchise, but expressly excludes from that prohibition, "recommendation, endorsement, exposition, persuasion, urging or argument . . ." 15 U.S.C. §1221(e).

The line between "attempted coercion" on the one hand, and "persuasion" of the sort allowed by the statute on the other, is necessarily a question to be decided on a basis of inferences. The Second Circuit, so noting, also observed that the determination of good faith derives from "a subjective analysis of the facts." *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corporation,* 447 F.2d 786, 792 (5th Cir. 1971). Whether the manufacturer acted to coerce or intimidate a dealer is a question peculiarly appropriate for jury determination.

The legislative history of the Act tells us that the existence of coercion or intimidation depends upon the circumstances arising in each particular case and *may be inferred from a course of conduct.* U.S. Code, Congressional and Administrative News (1956) 84th Congress, 2nd Session, Volume 3, Page 4603, cited in *York Chrysler-Plymouth, supra,* at 793, n.7 and in

American Motor Sales Corporation v. Semke, supra, at 197-198. In these two cases, the Fifth Circuit and the Tenth Circuit ruled that the entire course of dealing between a manufacturer and dealer may be considered and it may then be concluded by the jury that the total conduct was in violation of the Act. The Ninth Circuit has implicitly rejected this doctrine, by presuming to review the evidence itself and reject all of the jury's inferences which led to a finding of liability under the statute.

The Seventh Circuit Court of Appeals, in considering a closely analogous fact situation, found that the following requirements, imposed by the manufacturer, constituted actionable coercion under the statute. The dealer was required (no doubt the manufacturer would say "requested") to:

1. Attain his planning potential [ASO] of 360 cars;

2. Increase his wholesale credit line and maintain a 60 unit new car inventory;

3. Acquire a used car lot and new car storage facilities;

4. Hire a full time sales manager;

5. Hire and train four additional salesmen;

6. Participate in American Motors' Loaner Programs; and

7. Participate in American Motors' Corporate Identity program.

Shor-Line Rambler, Inc. v. American Motors Sales Corp., 543 F.2d 601, 603 (7th Cir. 1976).

The Court noted that "Shor-Line alleged that the demands were arbitrary, unreasonable and impossible to comply with." The manufacturer "offered contrary evidence but the jury found for Shor-Line." *Id.* at 603. The Court ruled that the issue of the manufacturer's bad faith "involves its intentions as manifested by its actions," and that this is a factual determination for the jury." *Id.* at 604. Even though some evidence was introduced to support the contention that the manufacturer may have been justified in terminating the dealer, the jury heard the evidence and returned its verdict for the dealer. The Court declined to disturb the verdict on appeal. *Id.* at 604.

The most that can be said of Saab's case here is that some evidence was introduced to support its contention that it was justified in terminating ABI, and this evidence was all edited, recited, and believed by the court below.

The course of action found to violate the statute in *Shor-Line Rambler* is hardly more coercive than that followed by Saab in the case at bar. Both manufacturers required the dealers to attain an unrealistic sales objective, increase inventory, and participate in certain manufacturer's programs. The opinion in *Shor-Line* does not indicate whether the inventory requirement was excessive, or the exact requirements of the manufacturer's loaner and corporate identity programs. Here, the manufacturer's "pilot scheme" and threat to place the dealer on C.O.D. had plainly coercive intent. Similarly, the annual sales objective and inventory requirements in the case of ABI

were considerably more onerous than the standards imposed on Saab's other dealers.

The approach followed by the Ninth Circuit in this case simply cannot be reconciled with the Fifth Circuit's decision in *York Chrysler-Plymouth* and the Seventh Circuit's decision in *Shor-Line Rambler* and the Tenth Circuit's decision in *Semke*. It is respectfully submitted that the time has come for this Court to review the statute, and to uphold the legislative intent.

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2. THE DECISION OF THE COURT OF APPEALS DEPRIVES PETITIONER OF ITS RIGHT TO TRIAL BY JURY UNDER THE APPLICABLE DECISIONS OF THIS COURT.

It is important to note that the Ninth Circuit did not find any error to have been committed by the court below. The meaning of the statute was fairly conveyed by the court's jury instructions, and the requirement of coercion received considerable emphasis through the mention of the words "coercion" or "intimidation" some nineteen times (RT 1877-1880). Given proper instructions, it is the jury's function to review the evidence and determine liability.

This Court has clearly delineated the jury's function as follows:

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."
>
> *Tennant v. Peoria & P.U. Railway Co.*, 321 U.S. 29, 35 (1944)

Where there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. Where there is a reasonable basis in the record for the jury's verdict, the Appellate Court may not weigh conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the jury. *Lavender v. Kurn,* 327 U.S. 645 (1946).

For the foregoing reasons, petitioner respectfully submits that the petition should be granted.

Dated, San Francisco, California,
April 12, 1978.

JEFFREY J. PARISH,
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JACK & BACIGALUPI,
Attorneys for Petitioner.

(Appendix Follows)

APPENDIX

In the United States Court of Appeals
for the Ninth Circuit

No. 75-2338

Autohaus Brugger, Inc.,
Plaintiff-Appellee,
vs.
Saab Motors, Inc., and Saab-Scania of America, Inc.,
Defendants-Appellants.

[Jan. 18, 1978]

On Appeal from the United States District Court
for the Northern District of California

OPINION

Before: BARNES and ANDERSON, Circuit Judges, and CRAIG,* District Judge.

J. BLAINE ANDERSON, Circuit Judge:

In this case Autohaus Brugger, Inc. (Autohaus), a franchised automobile dealer, brought suit against Saab Motors, Inc. (Saab), alleging breach of their franchise agreement and violation of the Automobile Dealers Day in Court Act [15 U.S.C. §§ 1221-1225]. The jury found in favor of Autohaus and awarded

*Honorable Walter E. Craig, Chief Judge, United States District Court, District of Arizona, sitting by designation.

$200,000 in damages. The trial court denied Saab's post-trial motions for judgment n.o.v., directed verdict, and new trial. Saab appeals. Because we find the evidence wholly insufficient to support either a breach of contract claim or a violation of the Dealers Day in Court Act, we reverse.[1]

15 U.S.C. § 1222 allowed the dealer to bring his action in the district court below. Our jurisdiction rests with 28 U.S.C. § 1291.

BACKGROUND.

Autohaus is an automobile dealership located in Redwood City, California, and is a wholly-owned subsidiary of Brugger Marketing Systems (BMS). Hubert Brugger is the President of Autohaus, as well as the majority shareholder of BMS. Autohaus came into existence in 1965 and had, at that time, one store (a dealership selling point) which was located in Palo Alto, California. At that time it sold and serviced only Mercedes Benz automobiles. In 1968, Autohaus built another store in Redwood City. The Palo Alto store was then managed by another subsidiary of BMS, which in 1969 executed the first of several non-exclusive one-year franchise agreements with Saab to sell and service Saab automobiles in the Palo Alto area. In 1971 Autohaus executed a similar agreement to become a franchised Saab dealer in the Burlingame, California area.

[1]We would also reverse on the grounds that the evidence is wholly insufficient to support the award of $200,000 in damages. However, since we find no liability, we need not discuss this issue.

These one-year franchise agreements were renewed in 1971 and in effect until September 30, 1972, when they came up again for renewal. These agreements were not renewed by either party, although there is convincing, unrebutted evidence in the record to show that Saab tried repeatedly to get Autohaus to renew. Finally, on December 20, 1972, Saab wrote to Autohaus and stated that Saab would not be renewing the franchise agreements. Shortly thereafter, Saab granted the franchise to another dealer who took over the sales and service of Saab automobiles for that area.

I. RELATIONSHIP BETWEEN THE PARTIES.

A. *The warranty claims.*

The key to this case is the issue of warranty claims. A warranty claim is a dealer's claim to the automobile manufacturer for reimbursement of the cost of parts and labor that a dealer has put into repairing a retailed automobile which is still covered by the manufacturer's warranty.

Under the franchise agreement[2] between Saab and Autohaus, Saab agreed to reimburse Autohaus for de-

[2]This agreement in pertinent part states:

"Company agrees that it will be responsible for handling the 'Warranty.' Dealer agrees to install new parts to replace defective parts without charge to the original purchaser. Reimbursement for such defective parts will be made by Company to Dealer without cost to the latter. Company agrees to credit Dealer with the labor cost involved in installing such parts, provided that the replaced parts are determined to be defective by Company. Labor credit shall be based upon a suggested Time Schedule and Dealer Warranty Labor Rate established by Company, which said Schedule may be amended by Company from time to time at

fective parts covered by the factory warranty and to reimburse Autohaus for the labor cost involved in installing these parts. The amounts for which Saab agreed to reimburse Autohaus on the labor charge were based on a suggested time schedule and labor rate established by Saab. This rate schedule is referred to as a "flat rate manual." For example, if an automobile was still within the factory warranty period and the crankshaft was found defective, then Autohaus would replace it. If the "flat rate manual" lists this job as a ten-hour job on a Saab model 99, (*see e.g.,* Plaintiff's Exhibit #291), then a proper claim to Saab for reimbursement would include the cost of the crankshaft as well as ten hours for labor charges.

From the beginning of their relationship these warranty claims created problems. Autohaus several times complained to Saab that the warranty claims were not promptly and fully reimbursed. These complaints increased in 1972, and, as shall be seen, were a substantial factor in the nonrenewal of the franchise relationship.

These warranty claims are the key to this case because Autohaus alleges that Saab owed reimbursement on these claims to Autohaus, that Saab refused to pay,

its sole discretion. Dealer agrees to submit Warranty claims directly to Company in accordance with the existing Company Policy.
"Dealer agrees to perform warranty work on all SAAB automobiles covered by the terms of the 'Warranty', whether or not such automobiles have been sold by Dealer, and Company agrees to honor all legitimate warranty claims made by dealer whether or not such claims pertain to automobiles sold by Dealer." (Pl. Ex. 166, p. 4).

that Saab tried to coerce Autohaus into dropping the claims, and finally that Saab terminated Autohaus because the claims were not dropped. Autohaus contends that this was a violation of the Automobile Dealers Day in Court Act, *supra.*

Our first inquiry then is to determine whether there is any evidence from which the jury could determine that Saab in fact owed any warranty monies to Autohaus, and, if so, whether they used them to coerce Autohaus in any manner.

At different times Autohaus made varying claims to Saab of amounts which Autohaus considered due. On November 30, 1971, Autohaus wrote to Saab and stated that according to their books Saab owed $4,627.04 on old warranty claims (Pl. Ex. #9). In June of 1972 this figure was both $10,054.70 (Pl. Ex. #86) and "over $8,000.00" (Pl. Ex. #87). In September this figure was both $19,386.23 (Pl. Ex. #104) and $15,008.08 (Pl. Ex. #105).

Autohaus arrived at these figures through its warranty claims register. Whenever Autohaus would perform work it felt was warranty related, it entered the claim into the warranty register. If Saab paid (or credited) the claim to Autohaus, then the bookkeeper would credit the warranty register and the amount would no longer be shown as owing. However, if Saab did not give Autohaus credit for the warranty work done or only paid the claim partially, then the remainder of the claim was still shown as owing in the warranty register. This situation occurred even if Saab's rejection and nonpayment of the claim was

perfectly valid. This, of course, meant that Autohaus would be carrying a claim that the warranty register said was owing, but which, in fact, was not owing.

The evidence shows that most, *if not all,* of the remaining claims in the warranty register were the type of claims which Autohaus had improperly submitted or Saab had already validly rejected.

For example, if Saab would receive a warranty claim and the reimbursable labor time claimed by Autohaus was over the allowed "flat rate" time, then Saab would reimburse for the agreed upon "flat rate" time and would reject the remainder of the warranty claim for the excess time. The warranty register still carried the claim for the excess time. Hubert Brugger admitted on cross-examination that "some of these claims showed higher labor than Saab allowed for that particular job to be paid." (R.T. 410) Gary Martin, a parts and service manager for Autohaus, testified that if a warranty repair took four and one-half hours to perform, and if the flat rate manual allowed three hours, then he would "regularly" submit a claim to Saab for the full four and one-half hours. (R.T. 1092) He stated that "if I felt we deserved the time we spent legitimate time on the car, certainly I would claim it." (R.T. 1099) When asked if Saab would honor that additional time, Martin said "In most cases, no." (R.T. 1099)

Charles Grelle was Autohaus' parts and service director. After stating that part of the problem with these warranty claims may have been Saab's fault, he also testified:

"Q. In the course of analyzing the claims and meeting with Mr. Soane, did you form the opinion that part of the reason for the [warranty] dispute was fault on Autohaus Brugger's end?

A. [Grelle] Yes.

Q. And were you able to determine what seemed to be the reason for the fault on Autohaus Brugger's end?

A. Well, the only thing that I could say was I could not substantiate some of them. That's not to say there wasn't substantiation somewhere, but I couldn't find it. Therefore I couldn't very well consider that a proper claim.

Q. Were there any of Autohaus Brugger's claims that you felt had been submitted in an incomplete form?

A. Yes." (R.T. 1367-1368)

On April 5, 1972, Saab's Regional Manager, Mark Boli and its District Sales Manager, Michael Long, met with Hubert Brugger and his assistant, Ronald Bartolucci, to try and clear up these warranty problems. Boli told Bartolucci that he would leave soon for Saab's headquarters in Orange, Connecticut, and he asked Bartolucci to give him copies of the disputed claims and with respect to each claim the claim number, owners' name and chassis number, so that he could have Saab's home-office staff examine them in an effort to resolve the difficulties. (Pl. Ex. #88) It was not until three months later, on June 27, 1972, when Bartolucci sent Boli a list of 70 claims (Pl. Ex. #87). However, Saab claims these were without the claim numbers, owners' names, and chassis numbers as Boli had requested at the April 5 meeting.

On July 3 Boli acknowledged receipt of the claims, and told Bartolucci that Saab would review them as soon as Autohaus provided it with complete information as requested. (Pl. Ex. #88)

Shortly after this letter, Bartolucci left Autohaus and the warranty claims problem was assigned to Charles Grelle. In August, Saab's service manager, George Soane, met with Grelle and together the two of them reviewed each of the unpaid claims Saab had not paid, and they took a sampling of those Saab had partially paid. They concluded that Saab owed Autohaus on some of the claims and not on others. On some claims Saab had actually overpaid Autohaus. There were other claims on which they could not reach agreement. (Pl. Ex. #105)

On August 24, Boli again met with Brugger to try and resolve the warranty dispute. At that time, Brugger claimed that Saab owed Autohaus $15,008.08 on the warranty claims. (Pl. Ex. #204) He suggested as a compromise that Saab pay the amount it conceded it owed and that the remainder be split on a "fifty-fifty" basis. Boli instead offered to spend whatever time was necessary to review each of the remaining claims, but he was not willing to split the claims on a certain percentage basis regardless of their merit. Brugger adamantly refused to spend any more time in reviewing the remaining claims.

Shortly thereafter, on September 1, 1972, Brugger wrote to Saab and demanded payment for the warranty claims. He claimed in this letter that $19,386.23 was due. He also stated:

> "It is our intention to obtain legal assistance for the collection of our receivables, if the accounts are not completely cleared by the 11th of September 1972" (Pl. Ex. #104).

On September 14, 1972, Boli replied to Brugger, stating that:

> "According to the information that you presented, you had $15,008.08 on your books as unpaid warranty claims by Saab. . . . Mr. Garelli [Grelle] and Mr. George Soane have reviewed your warranties and 'per your spreadsheet' you showed we owed $9,095.43. Of this figure we have agreed we owe $5,067.45, which includes resubmitted claims. Also, there is $158.61 of which you claim we owe 50%. There is $2,569.18 which Mr. Garelli [Grelle] stated we did not owe, and $1,300.19 is in dispute.
>
> * * *
>
> "You also presented another spread sheet which you considered partial payments, total amount of $5,912.60. In discussing this I explained to you that these have been paid and were not brought up in review of warranty claims by Mr. Bartolucci, your former vice president, and were just handed to us by Mr. Garelli [Grelle]. We did not feel that this was eligible for review as these claims had been paid and if there were any shortages in payment, they should have been brought up at that time.
>
> * * *
>
> "Enclosed is a detailed analysis for me by Mr. Soane explaining the disposition of each warranty claim presented to us for review. . . . I am sure if you make a thorough investigation of this

situation, you will find a great amount of these problems to be internal." (Pl. Ex. #105).

Attached to this letter were numerous sheets of warranty claims, which set forth an explanation for the manner in which Saab handled each claim. A sampling of these explanations reads like this:

"This claim was reduced on the labor rate. Claimed for 27.1 hours—reduced to 8.5 hours";

"This claim is for a 1,000 mile service, not warranty";

"Work on R.O. is not warranty work, claim copy does not show chassis No. or date of sale."

While Brugger received this letter and the detailed analysis of the claims, he testified that he did not review it in any detail. He referred the analysis to Charles Grelle, but never received back any counter-analysis of the claims from him. At trial, Brugger was unable to point to any specific claim or claims which were legitimately owed by Saab. He was not concerned with the individual claims, but rather was concerned only with the total balance showed owing by the warranty register (which, as indicated above, was not necessarily correct). And Charles Grelle testified that as far as he knew there was *no* claim which Saab admitted it owed which had never been paid. (R.T. 1391)

In order to satisfy its burden of proof that warranty claims were owed by Saab, Autohaus needed to present specific evidence of that fact. This, they cannot do. At trial, in their brief, and at oral argument here, Autohaus has totally failed to produce

any evidence of any single warranty claim which was definitely owed by Saab and which was not paid. We have searched the entire 1,896 pages of the transcript in this case and still can find no evidence of a single claim which was validly owed by Saab and not paid. True, the warranty register shows that certain amounts were "claimed" by Autohaus, but in no sense does this mean that the amounts were legitimately owed. As we have already discussed, Autohaus conceded that many of the claims in the warranty register were over and above the amounts Saab in the franchise agreement had agreed to pay. Soane's analysis of the outstanding claims shows why Saab had rejected the claims. In the appendix to its brief, Saab lists eleven claims (showed as owing in the warranty register), which Saab contends were validly rejected and not owing. Autohaus was unable at trial, and is unable here, to present any evidence to refute Saab's position that the claims were not legitimately owing.

The only evidence which Autohaus can point to to suggest that Saab owed Autohaus on the warranty claims is interrogatory No. 69. In the answer to this interrogatory, Saab agreed that it owed Autohaus $2,905.58.[3] However, where Autohaus suggests that this answer shows that Saab owes this amount on warranty claims (Autohaus' Opening Brief, p. 8), this is misleading because the interrogatory itself reads:

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[3]This figure should read $2,876.73 due to a mathematical correction (RT 1887).

> "What amount, if any, is currently owed by Saab to plaintiff *in connection with any matter whatsoever,* including amounts owed in connection with warranty claims made by plaintiff?" (C.R. 93, R.T. 939) (emphasis added).[4]

Of this $2,905.58 figure, Autohaus cannot point to one single specific warranty claim which is included in the figure and was not paid. Nor can Autohaus prove that this figure is anything other than the normal expenses which Saab would incur when winding up a franchise arrangement such as that with Autohaus.

Our inquiry through the record, the trial transcript, and the many exhibits in this case leads us to the inescapable conclusion that Autohaus has failed to carry its burden of proof and show that legitimate warranty claims were owed by Saab. We find that there is just no evidence from which a reasonable jury could find that Saab owed money to Autohaus on the warranty claims. It follows then, that with no

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[4]Interrogatory No. 68 reads: "Commencing on what date did Saab refuse to reimburse plaintiff for warranty work performed by plaintiff on Saab Automobiles?"

The answer to Interrogatory No. 68 reads: "Saab never refused to reimburse plaintiff for warranty work performed by plaintiff on Saab automobiles. See also answer to Interrogatory No. 50." (CR 93)

Interrogatory No. 50 reads: "State the basis on which Saab refused to reimburse plaintiff for Saab warranty work performed by plaintiff after December 20, 1972."

The answer to Interrogatory No. 50 reads: "Saab did not refuse to reimburse plaintiff for Saab warranty work performed by plaintiff after December 20, 1972. All warranty claims submitted by plaintiff were processed in accord with standard procedures. To the extent that individual claims were refused, such refusal was based on the failure of the particular claim to qualify under Saab's standard warranty policies." (CR 88)

warranty monies due, Saab could not have used them to "coerce" Autohaus as Autohaus alleges.

B. *Franchise Renewal Efforts and Who Wanted To Terminate Whom?*

In July of 1972, while the warranty dispute was going on, Michael Long went to Autohaus' outlet in Burlingame to obtain an order for cars. Long was Saab's district manager and responsible for selling cars to the dealers. He tried to sell some new cars to Autohaus because he felt that Autohaus' inventory was falling to a comparatively low level considering the market where Autohaus was located. At that time Brugger told him that Autohaus refused to order any more cars until Saab satisfied the warranty claims. (R.T. 180-182). Brugger also instructed Garrison Paul, the manager of the Burlingame store, Jurgen Von Beekum, the general manager of the Palo Alto store, and Peter Widdershoven, a sales manager, that they were to order no more Saab cars for inventory until Saab settled on the warranty claims (R.T. 180, 677, 1275, Pl. Ex. #93).

On August 24, 1972, Long returned to Autohaus to secure an order for cars. Brugger again refused. In his report back to Saab, Long wrote:

> "Mr. Brugger gave an ultimatum that Saab pay his request on warranty claims today—or else. He refused to order cars to bring his inventory up to a satisfactory level. He will not voluntarily terminate and he will not cooperate." (Pl. Ex. #101).

Four days later, on August 28, Long again contacted Brugger to try and sell Autohaus some new cars for inventory. Brugger's response when asked to buy more cars was "No, I will not." (R.T. 304). He indicated he would not order any more cars until Saab settled the warranty dispute around his "proposal" which was the fifty-fifty split of the contested claims (R.T. 180, 677, 1275, Pl. Ex. #93).

Brugger exhibited the same attitude about renewing the franchise agreements. That is, he didn't want to discuss renewal until the warranty situation was cleared up. The evidence also showed that Brugger was disenchanted with the franchise with Saab and had a desire to get out from under the agreement. At one point in July of 1972, Brugger observed to Garrison Paul that he would like to get out from under the agreement because it was "driving him crazy with the expense and so-forth" (R.T. 199). He also observed to Paul that he would have to let Saab terminate him since under that situation Saab would "have to settle the whole thing up and take back the parts. . . ." (R.T. 199). Peter Widdershoven testified that sometime during the summer or early fall of 1972, he asked Brugger about getting rid of Saab. Brugger replied "Let's wait and see what happens. I'd rather have them terminate me than vice versa." (R.T. 1286). Widdershoven also testified that sometime prior to December of 1972 Brugger had told him that he was attempting to maneuver Saab into a position where he could sue them. (R.T. 1296). And, finally, the minutes of an Autohaus staff meeting

held late in 1972 show that "A.B.I. [Autohaus] is in a more advantageous position by having Saab cancel franchise and not us." (R.T. 485).

While we find substantial evidence in the record to show that Saab tried to get Autohaus to renew the franchise agreement both before and after the September 30 expiration date, we find no evidence that Autohaus ever sought out or made any request to Saab that the franchise be renewed.

All during this controversy in 1972 the sales of Saab cars at Autohaus continued to drop, as did the inventory. (R.T. 152). For example, in October of 1972 Autohaus took delivery of only two cars from Saab and none thereafter. (R.T. 944).

By mid-December of 1972 Saab still had not received any indication whatsoever from Autohaus that it genuinely wished to continue as a franchised dealer. As Saab notes, "all indications were to the contrary" (Saab Opening Brief, p. 13). Finally, on December 20, 1972, W. Donald Carmack, Saab's vice president of sales and marketing, wrote to Autohaus and stated that they would not renew the franchise. In his letter he stated:

> "As you know, the term of both of those agreements ended on September 30, 1972. After considerable analysis of your selling performance, it has been determined that we will not be renewing those Agreements. The reason for our decision concerns your inability to sell the number of Saab automobiles that both of us have projected as a reasonable amount given the popula-

> tion, affluence, and other factors connected with the areas in which you have been operating." (Pl. Ex. #115).

Autohaus rejected the reason given by Saab for the nonrenewal of the franchise and instead claimed that the real reason for the nonrenewal was Saab's "attitude towards payment of [the] warranty claims." (Pl. Ex. #119). This litigation followed.

II. Standard of Review

As mentioned, Saab moved for a directed verdict, a judgment n.o.v., or in the alternative a new trial. Upon denial of these motions, Saab appeals.

The standards for granting a judgment n.o.v. and for a directed verdict are the same. *Cockrum v. Whitney,* 479 F.2d 84, 85 (9th Cir. 1973).

When considering the propriety of the grant or denial of a motion for judgment n.o.v. or a directed verdict, the correct standard is:

> ". . . whether or not, viewing the evidence as a whole, there is substantial evidence present that could support a finding, by reasonable jurors, for the nonmoving party. Butte Cooper & Zinc Co. v. Amerman, 157 F.2d 457, 458 (9th Cir. 1946). 'Substantial evidence is more than a mere scintilla.' Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938); Butte Cooper & Zinc Co., supra. The evidence must be examined in a light most favorable to the nonmovant, Continental Ore v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 & n. 6, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), and there can be no weighing of evidence. Tenant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed. 520 (1944). Finally, appellant here is entitled to the benefit of all *reasonable* inferences that may be drawn from its evidence. Standard Oil Co. v. Moore, 251 F.2d 188, 198 (9th Cir. 1957), cert. denied, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed. 2d 1148 (1958)." *Chisholm Brothers Farm Equipment Co. v. International Harvester,* 498 F.2d 1137, 1140 (9th Cir. 1974), *cert. denied,* 419 U.S. 1023.

After reviewing the entire record with these principles in mind, we are left with "the definite and firm conviction that a mistake has been committed" by the trier of fact. *United States v. United States Gypsum Co.,* 333 U.S. 364, 394-395 (1948); *Anderson v. United States,* 555 F.2d 236, 237 (9th Cir. 1977). We hold under the facts of this case that the evidence is wholly insufficient to support a reasonable jury's finding in favor of Autohaus on either the breach of contract claim or violation of the Dealers Day in Court Act. *Brady v. Southern Railroads,* 320 U.S. 476 (1943). A motion for directed verdict should be granted "where there is no substantial (or 'believable') evidence to support" any other verdict. *Hawkins v. Sims,* 137 F.2d 66, 67 (4th Cir. 1943); 5A Moore Federal Practice ¶ 50.02 [1] 2d Ed., 1968 and cases cited therein; *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5th Cir., en banc, 1969), *Wagle v. Murray,* 560 F.2d 401 (9th Cir. 1977). Therefore, the trial court's denial of Saab's motion for judgment notwith-

standing the verdict was error and we reverse and vacate the judgment.

III. Dealers Day In Court Act[5]

The purpose[6] of the Dealers Day in Court Act is to supplement the antitrust laws of the United States

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[5]The pertinent portions of this Act read:

"1221(e) The term 'good faith' shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided,* That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

"§ 1222. Authorization of suits against Manufacturers; amount of recovery; defenses

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

[6]One of the major reasons for passage of the Dealers Day in Court Act was to balance the power between the automobile manufacturers and the dealers. In its reasons for the Act, the House Report stated:

> Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is required to remedy the manifest disparity in the ability of franchised dealers of automotive vehicles to bargain with their manufacturers. Investigations of the automobile industry, moreover, demonstrate a continuing trend toward greater concentration, as well as abuse by the manufacturers of their dominant position with respect to their dealers. These investigations have disclosed practices

and permit a franchised automobile dealer to bring suit for damages in the United States district courts for the failure of the automobile manufacturer to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the dealer's franchise. House Report No. 2850, 84th Cong. 2d Sess. (1956), 1956 U.S. Code Cong. & Admin. News, p. 4596.

Good faith is defined as the duty of a dealer and a manufacturer "to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party." 15 U.S.C. § 1211(e).

There is no question that the failure to exercise good faith within the meaning of the Act has a limited and restricted meaning. It is not to be construed liberally. *Miles v. Ford Motor Co.,* 317 F.2d 712 (3rd Cir. 1963), *cert. denied,* 375 U.S. 896. It does not mean "good faith" in a hazy or general way, nor does it mean unfairness. The existence or nonexistence of "good faith" must be determined in the context of actual or threatened coercion or intimidation. *Lawrence Chrysler-Plymouth, Inc. v. Chrysler Corp.,*

> and conditions which require new legislative methods and a change in established concepts. The bill as amended proceeds from the conclusion that in the automobile industry concentration of economic power has increased to the degree that traditional contractual concepts are no longer adequate to protect the automobile dealers under their franchises. House Report No. 2850, 84th Cong. 2d Sess. (1956) 1956 U.S. Code & Admin. News, pp. 4596-97.

461 F.2d 608 (7th Cir. 1972), *cert. denied,* 409 U.S. 981; *Salco Corp. v. General Motors Corp.,* 517 F.2d 567 (10th Cir. 1975); *Overseas Motors, Inc. v. Import Motors Limited,* 519 F.2d 119 (6th Cir. 1975), *cert. denied,* 423 U.S. 987; *Rea v. Ford Motor Co.,* 497 F.2d 577 (3rd Cir. 1974), *cert. denied,* 419 U.S. 868; *McGeorge v. Leyland Motor Sales, Inc.,* 504 F.2d 52 (4th Cir. 1974), *cert. denied,* 420 U.S. 992; *Autowest, Inc. v. Peugeot, Inc.,* 434 F.2d 556 (2nd Cir. 1970); *Cecil Corley Motors Co., Inc. v. General Motors Corp.,* 380 F. Supp. 819 (M.D. Tenn. 1974).

In order to lack good faith the manufacturer's actions must be unfair and inequitable in addition to being for the purpose of coercion and intimidation. *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.,* 583 F.2d 510 (10th Cir. 1976).

Coercion or intimidation must include a wrongful demand which will result in sanctions if not complied with, *Fray Chevrolet Sales, Inc. v. General Motors Corp.,* 436 F.2d 683 (6th Cir. 1976), and it is necessary to consider not only whether the manufacturer brought pressure to bear on the dealer, but also his reason for doing so. *Rea v. Ford Motor Co., supra* (497 F.2d at 585), *Overseas Motors, Inc. v. Import Motors Limited, supra* (519 F.2d at 124).

When a termination or nonrenewal of a franchise is involved, there must be a "causal connection" between the dealer's resistance to the coercive conduct and the termination or nonrenewal for there to be a lack of good faith under the Act. *Autowest, Inc. v. Peugeot, Inc., supra* (434 F.2d at 561).

The existence of coercion or intimidation depends upon the circumstances arising from each particular case. However, unless the transactions between the parties involve coercion or intimidation, or threats of coercion or intimidation, the duty of good faith imposed by the Act does not prohibit a manufacturer's "recommendation, endorsement, exposition, persuasion, urging or argument normal in competitive commercial relationships." House Report 2850, *supra* (1956 U.S. Code Cong. & Admin. News at p. 4596).

If the evidence discloses normal sales recommendation or persuasion, the manufacturer will not be liable. The Act also does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the Act curtail the manufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise. (Id. at p. 4603).

In *Randy's Studebaker Sales, supra,* the Tenth Circuit noted several examples of what actions did not constitute lack of good faith:

> "Thus, a manufacturer who refuses to renew a franchise is not guilty of lack of good faith where the dealer has failed to comply with the franchise terms for a long period of time. Nor in the case of one who has had sub-standard sales performance. Or if the dealer should have inadequate financial resources, termination of the franchise is not in bad faith. Elimination of a dealer who has sold its manufacturer-approved location and seeks to move to a location not in keeping with

> the manufacturer's metropolitan planning does not establish a lack of good faith on the part of the manufacturer. And where the dealer refuses to take all of the manufacturer's line of cars, choosing instead to continue to deal in competitor cars, lack of good faith is not shown by refusal to renew the franchise." (Footnotes omitted) (533 F.2d at 515).

For some examples of where courts have found that manufacturer's actions do lack good faith and violate the Act, *see McGeorge v. Leyland Motor Sales, Inc.,* 504 F.2d 52 (4th Cir. 1974) (where the manufacturer tried to compel the dealer to accept an undesirable line of cars by withholding delivery to the dealer of a highly successful line of cars); *Rea v. Ford Motor Co.,* 497 F.2d 577 (3rd Cir. 1974) (where the manufacturer threatened to cease shipping Ford cars, unless a separate corporation, in which dealer was a principal stockholder, resigned its franchise as an Oldsmobile dealer in a neighboring town); *Autowest, Inc. v. Peugeot, Inc.,* 434 F.2d 556 (2nd Cir. 1970) (where the manufacturer terminated the dealer because the dealer resisted the manufacturer's coercion to follow the suggested resale price); *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., supra* (where the manufacturer used the nonrenewal weapon, as well as curtailment of car deliveries in order to coerce the dealer into a program of retail price fixing); and *Shor-Line Rambler, Inc. v. American Motor Sales,* 543 F.2d 601 (7th Cir. 1976) (where the manufacturer put unreasonable and unrealistic demands on the dealer to build new facilities, increase credit, and

make extensive personnel changes, then terminated the dealership when it could not comply.)

Autohaus contends that there are seven areas where the evidence shows that Saab violated the Dealers Day in Court Act. While we disagree that these show *any* evidence of a violation of the Act, we shall briefly discuss each claim. These claims are:

(1) *That Saab attempted to intimidate Autohaus to drop its warranty claims.*

As we have already extensively discussed, the record is barren that Saab owed and withheld *any* legitimate warranty claims from Autohaus. With no warranty claims owing, it would not be possible for Saab to use these to "coerce" Autohaus into doing something it did not want to do.

(2) *That Saab imposed arbitrary and coercive sales quotas.*

During the early days of their franchise relationship, Saab and Autohaus agreed that as a twelve-month-sales objective, Autohaus would try and sell 120 units. (Pl. Ex. #171). Autohaus did not reach this number of sales for any twelve-month period, nor did very many other Saab dealers, as Saab nationwide faced strong competition in the import field.

It is true that a violation of the Act may occur when a manufacturer sets an unrealistic goal (which none of its dealers can meet) and then selectively terminates one dealer for failing to meet that goal. *See, e.g.,* the reasoning of Judge Will in *Madsen v.*

Chrysler Corp., 261 F. Supp. 488 (N.D. Ill. 1966), *vacated as moot*, 375 F.2d 773 (7th Cir. 1967). However, in this case, for Autohaus to suggest that Saab violated the Dealers Day in Court Act by merely agreeing to or establishing the sales objective, completely misses the mark. First, Saab did not use as grounds for the nonrenewal of the franchise the fact that Autohaus had not sold the 120 cars. Rather, Saab did not renew the franchise because of Saab's analysis of Autohaus' selling performance which, as we have discussed, *supra*, was not very good. Secondly, and even more importantly, there is not one shred of evidence to suggest that Saab ever used the 120-unit sales objective to coerce Autohaus (*i.e.*, Saab never threatened Autohaus either to make the sales objective or to be terminated). Quite the contrary, the evidence strongly shows that even though Autohaus did not make the sales objective, Saab still tried repeatedly to obtain Autohaus' renewal of the franchise agreement.

(3) *That Saab threatened to place Autohaus on C.O.D. status for parts.*

At times, during the franchise, Hubert Brugger admitted that Autohaus was in default on some of his payments for parts purchased from Saab (R.T. 319). Because of these delinquencies, some of the internal personnel at Saab suggested amongst themselves that Autohaus be placed on C.O.D. status for parts. Brugger testified that on August 24, 1972, Boli mentioned to him that Saab was "contemplating" putting Autohaus on C.O.D. status. Apparently, sometime around this period it was discovered that Autohaus

was not delinquent in its parts account and Autohaus was never put on C.O.D. status.

Even if we were to assume that this C.O.D. issue was directed as a threat to Autohaus (which we do not feel the evidence demonstrates), we find no way for this to be a violation of the Act. Once a dealer has become delinquent in its accounts, the manufacturer has every right to protect itself. Nor do we find any "causal connection" between the "threat" and some action which Autohaus would be coerced to take in the alternative. Autohaus obliquely argues in its brief that the "threat" was that Autohaus drop its warranty claims or else be put on C.O.D. Keeping in mind our discussion, *supra*, of the warranty claims issue, we find this argument to be without merit.

(4) *That Saab attempted to coerce Autohaus to inflate its inventory*

The legislative history of the Dealers Day in Court Act clearly states that one of the violations of the Act would be for the manufacturer to coerce the dealer into accepting "automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb." The legislative history goes on to provide that this "may *in appropriate instances* constitute coercion or intimidation." (1956 U.S. Code Cong. & Admin. News at p. 4603) (emphasis added).

True, Michael Long did visit Autohaus several times and solicit orders for Saab cars. This was his job. He solicited orders from *all* of the dealers in his sales district. Here again, we find absolutely no evidence of

any coercion in Long's attempts to sell Autohaus some cars. Nor do we find any "causal connections" between the alleged "coercion" and something which Autohaus was supposed to be "coerced" into doing, and which it had a right not to do (other than the same oblique allegation regarding the warranty claims).

We find Long's attempt to solicit orders from Autohaus for new cars to be nothing more than the "recommendation, endorsement, exposition, persuasion, urging, or argument normal in competitive commercial relationships" which is clearly permitted under the Act. House Report No. 2850, *supra,* (1956 U.S. Code Cong. & Admin. News at p. 4596).

Autohaus' statement in its brief (p. 22) that "Mr. Long testified he told Mr. Brugger that he must cooperate or terminate," is nothing other than pure misstatement of the record.[7]

(5) *That Saab improperly denied Autohaus' order for 1973 models*

On November 28, 1972, some two months after the franchise expiration, Peter Widdershoven, Vice President and Sales Manager of Autohaus, per Hubert

[7]Michael Long's testimony, which Autohaus refers to on this matter was:

> "Mr. Brugger, I meant that he would not voluntarily terminate. Mr. Brugger refused to sign a selling agreement, [the franchise renewal] he refused to buy cars. He was twenty-five percent of my business and he was putting me out of business. I said 'Would you sign the selling agreement?' He refused. I said 'Will you terminate so I can get somebody that will do the job?' It was just that simple." (RT 1673-74)

Brugger's specific instructions, ordered fourteen new 1973 model cars from Saab. This order did not specify any colors which was customary for car orders. Saab wrote a letter back stating that not all of the units ordered was available, that the new 1973 models were in short supply, and that these cars were being shipped to dealers who already had "sold orders" for the new models.

Hubert Brugger testified that his order was a serious good faith order. However, a review of Peter Widdershoven's testimony indicates that Brugger's order was not a good faith order, but instead was merely a method to find out where Autohaus stood as a dealer for Saab. Brugger told Widdershoven something to the effect of "Let's order some '73 cars and see what happens." (R.T. 1281). It should also be kept in mind here that Brugger also told Widdershoven at one point that he was attempting to maneuver Saab into a position where he could sue it. (R.T. 1296).

A willful and arbitrary refusal by a manufacturer to deliver to a dealer the models ordered can violate the Dealers Day in Court Act where there is coercion, intimidation, or threats of coercion or intimidation which is "causally connected" to the refusal to deliver. *See, e.g., Rea v. Ford Motor Co., supra,* (533 F.2d 510).

Even if the jury were to find in this case that Autohaus' order for new cars was bona fide and that Saab had the cars but refused to deliver them, there is no evidence from which a jury could find that Saab

tried to coerce or intimidate Autohaus by withholding the cars.

(6) *That Saab's "Pilot Scheme" was coercive.*

Saab put certain dealers with above average warranty costs on a "pilot scheme" whereby the warranty work was watched more closely. Under this scheme Autohaus and some other dealers were required to withhold some of their warranty claims until the Saab service representative had given his approval.

Autohaus argues that the scheme was an attempt by Saab to force Autohaus to reduce its warranty claims. Autohaus contends that the scheme was coercive because Saab merely selected Autohaus on the basis of high cost "without *any* indication that [Autohaus'] claims were improper" (Autohaus Opening Brief, p. 26) (emphasis in original). This statement by Autohaus is a patent fabrication. As we have discussed, *supra,* Saab had numerous indications that Autohaus' warranty claims were improper, either in their submission or the claim itself. And, furthermore, at trial, Hubert Brugger, as well as several of his employees, *admitted* that many of the claims submitted were improper.

In any event, we find no evidence from which the jury could have found that the "pilot scheme," instituted by Saab to watchdog excessive warranty claims, was in any way coercion in violation of the Dealers Day in Court Act.

(7) *That Saab threatened to replace Autohaus with another dealer.*

The evidence here again is insufficient to show that there was a threat to replace Autohaus with another dealer. There is also no evidence to suggest that if there was a threat, that it was used to coerce or intimidate Autohaus.

And, as the legislative history points out, appointing a new dealer in the same area is not a violation of the Act unless the action is used as a method of coercion. House Report No. 2850 states:

> "The [Act] does not freeze present channels or methods of automobile distribution and would not prohibit a manufacturer from appointing an additional dealer in a community provided that the establishment of the new dealer is not a device by the manufacturer to coerce or intimidate an existing dealer. The committee emphasizes that the [Act] does not afford the dealer the right to be free from competition from additional franchised dealers. Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this right would be inconsistent with the antitrust objectives of this legislation." (1956 U.S. Code Cong. & Admin. News, at pp. 4603-04).

IV. Breach of Contract Claim

Autohaus' primary argument[8] on the breach of contract claim is that as a matter of law the fran-

[8]Autohaus raises several other points which they contend show Saab's breach of contract. However, from our review of the evidence, we find them to be without merit and we need not discuss them.

chise agreement was continued after the September 30, 1972, expiration date. Autohaus then contends that with the franchise agreement in effect, Saab's "termination" on December 20, 1972, was a breach of the continued agreement. We disagree.

Autohaus contends that the franchise agreement was extended by the conduct of the parties. Such conduct which Autohaus contends continued the agreement is that Autohaus continued to sell, service and do warranty work after September 30, 1972, that Saab continued to send literature to Autohaus, and that one of Autohaus' employees attended a Saab dealership meeting in November. Autohaus relies on *Martin v. Campanaro,* 156 F.2d 127 (2nd Cir. 1946), *cert. denied,* 329 U.S. 759, which states:

> "A contract implied in fact derives from the 'presumed' intention of the parties as indicated by their conduct. When an agreement expires by its terms, if, without more, the parties continue to perform as theretofore, an implication arises that they have mutually assented to a new contract containing the same provisions as the old."

Autohaus stops the quote at this point. However, the quote continues on to read:

> "Ordinarily, the existence of such a new contract is determined by the 'objective' test, i.e., whether a reasonable man would think the parties intended to make such a new binding agreement—whether they acted as if they so intended." (156 F.2d at 129.)

We find as a matter of law that the franchise agreement here did not continue in effect past the September 30, 1972, expiration date for two reasons. First, under the standards of the *Martin* case, the evidence as discussed, *supra,* leads to the inescapable conclusion that Hubert Brugger did not want the franchise to continue. In short, we find no way that a reasonable person would think that Autohaus (Hubert Brugger) "intended to make such a new binding agreement." Secondly, and most importantly, the original franchise agreement itself, which Brugger signed, states that acceptance of orders of continuance of sales or any other act by Saab after termination[9] of the agreement *"shall not be construed as a renewal of this Agreement for any further term."* (Pl. Ex. #171) (emphasis added).[10]

CONCLUSION

The verdict of a jury should not lightly be set aside—certainly not for the mere reason that a court may disagree with it. However, in this case we are convinced that this verdict for the plaintiff, if allowed to stand, would be a legally unjustified windfall to the plaintiff and a miscarriage of justice. Therefore, we are compelled to reverse. Since Saab has admitted that a sum of $2,876.73 is the final balance owing on

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[9]We find that the terms "termination" and "nonrenewal" as used in this particular circumstance are synonymous.

[10]We note in passing that the trial court erred when it left the interpretation of the franchise contract up to the jury. The interpretation of a written contract is a question of law for the court to determine. *See* 4 Williston on Contracts §§ 616, p. 649, et seq.

the Autohaus account (see jury instruction, R.T. 1882-1883, 1886-1887), we reverse and vacate the judgment below and remand this case to the district court for the entry of a judgment in favor of Autohaus in that amount *(Neely v. Eby Construction Co.,* 386 U.S. 317 (1967), 28 U.S.C. 2106), together with interest from the date of the original judgment. Rule 37, F.R.A.P. Costs are allowed to appellant. Rule 39(a) F.R.A.P.

REVERSED, VACATED and REMANDED with instructions.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1482

AUTOHAUS BRUGGER, INC.,
Petitioner,

vs.

SAAB MOTORS, INC. and SAAB-SCANIA OF AMERICA, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondents in Opposition

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (App. of Petition) is reported at 567 F.2d 901. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this Court's review of the entire record below reveals no substantial evidence that could support a reasonable jury's finding of a violation of the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225.

2. Whether the District Court erred in permitting a surprise and previously undeposed witness to testify on crucial liability issues.

3. Whether the District Court erred in refusing to allow cross-examination of the only expert witness on the issue of damages where the expert's opinions were based upon unsubstantiated assumptions not in evidence.

4. Whether the District Court erred in leaving for the jury's determination a question of law involving interpretation of a contract.

STATEMENT

Petitioner Autohaus Brugger, Inc. (Autohaus), a franchised automobile dealer, complains that Respondents Saab Motors, Inc. and Saab-Scania of America, Inc. (Saab),* an automobile distributor, breached their franchise agreement and violated the Automobile Dealers' Day in Court Act (the Act), 15 U.S.C. §§ 1221-1225. The genesis of this litigation and the key to its disposition are Autohaus's warranty payment demands. Pursuant to the franchise agreement between Saab and Autohaus, Saab was required to reimburse Autohaus for parts used and work done by Autohaus on Saab cars during the warranty period. Ex 167 p. 4; 171 pp. 12-13. Autohaus asserts that its warranty

*Saab-Scania of America, Inc. is the successor in interest to Saab Motors, Inc., which was also named as a defendant in this action (CT 18:19-21).

Matters of form: The Reporter's Transcript will be cited "RT" followed by page, colon and line numbers. The Clerk's Transcript will be cited similarly. Exhibits will follow the District Court's designation.

claims were not honored by Saab. According to Autohaus, the warranty claims dispute escalated into a violation of the Act with Saab attempting to coerce Autohaus into abandoning the warranty claims and eventually terminating Autohaus when the claims were not forsaken.

Saab will not dwell on each and every fact surrounding the asserted warranty indebtedness except to point out that the Court below in its opinion (567 F.2d at 904-908) thoroughly discusses the paucity of evidence on this issue and concludes that Saab owes Autohaus nothing on the disputed warranty claims. This dearth of evidence exists despite the fact that the District Court, over Saab's repeated objections, allowed Autohaus's bookkeeper to testify even though she had not been identified as a prospective witness and had not yet been deposed by Saab. RT 1332:21-25; 1460:9-1462:1; 1472:10-1474:3; 1476:20-1510:8.

Coincident with the warranty claims dispute, Saab was making efforts to renew Autohaus as a dealer. Autohaus challenges this fact and contends that Saab was using various coercive and intimidating means to terminate Autohaus as a dealer. Petition, pp. 11-32. At this stage, Saab deems it pointless to indulge in another recitation of the lack of evidence necessary to support Autohaus's claims. Autohaus is raising before this Court the exact same arguments it advanced before and had rejected by the Court below. The only way Saab knows to conclusively refute Autohaus's contentions is to place before this Court its own lengthy rendition of the facts below. Saab eschews this chore because this Court's function is not to review evidence, especially in determining whether to grant certiorari.

At trial, Autohaus's expert witness on the issue of damages, an accountant, was allowed to testify, over repeated objections, that in his opinion Autohaus lost profits because

Saab failed to renew the franchise. RT 767:20-768:6; 770:5-10; 771:2-5; 775:22-776:3; 782:10-13; 783:20; 801:4-18. The accountant conceded that his opinion was based upon an assumption of projected car sales for which there was no evidence and that in computing the lost profits in this case, he used Autohaus's historical gross to net profit ratio for its entire business of selling four different model cars rather than just Saabs. RT 774:9-25; 784:1-786:9; 817:22-827:1. The District Court refused to permit Saab to cross-examine the accountant on the obvious foundational deficiencies infecting his opinion testimony. RT 816:10-817:16. The opinion below notes: "We would also reverse on the grounds that the evidence is wholly insufficient to support the award of $200,000 in damages. However, since we find no liability, we need not discuss this issue." 567 F.2d at 904, fn. 1.

At the conclusion of the evidence, the District Court left to the jury the interpretation of the franchise agreement. RT 1856:5-13. At issue was whether the agreement expired by its own terms on September 30, 1972, or whether it continued in effect past that date. The Court below found this to be error since "interpretation of a written contract is a question of law for the court to determine." 567 F.2d at 915, fn. 10.

Autohaus did not seek a rehearing before the Ninth Circuit division that rendered the opinion below. Had it done so, Autohaus could have properly pressed its plea for a second review of the evidence to a court which had already combed through the entire record below. Moreover, Autohaus did not request a rehearing before the Ninth Circuit en banc. Instead, Autohaus inappropriately fulfills the often articulated but happily seldom consummated threat—"I'll take this all the way to the United States Supreme Court."

ARGUMENT

Autohaus's 37 page Petition contains a lengthy, 26 page "Statement" section devoted to its version of the record below. In contrast, the "Reasons For Granting The Writ" section is only six pages long. The reason is clear: Autohaus is petitioning this Court for a second review of the evidence.

In an attempt to legitimize its entreaty to this Court, Autohaus poses a sham conflict of decision. Making reference to three other circuit court decisions involving the Act, Autohaus asserts that the "approach" followed by the Court below is somehow at variance with the other three decisions. However, the "approach" followed by each court is the same —the well established standard of appellate review of a jury verdict. This "approach" is so well settled that it is deserving of absolutely no consideration by this Court.

I. There Is No Conflict of Decision

Autohaus's assertion that the *"approach"* followed by the Court below "simply cannot be reconciled" with the *decisions* of three other circuit courts (Petition, p. 36) by its very words does not create a true conflict of decision worthy of review by this Court on certiorari. Since Autohaus cannot point to any real conflict of decision because this case and the others all turn on differing facts, it is reduced to claiming that the standards of appellate review utilized below conflict with those used by the other circuit courts. Even if credence is given to Autohaus's contention that the purported difference in "approach" equals a true conflict, close scrutiny reveals that even this conflict in approach is illusory.

Citing *American Motors Sales Corporation v. Semke,* 384 F.2d 192 (10th Cir. 1967) and *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corporation,* 447 F.2d 786 (5th Cir. 1971) as the allegedly conflicting decisions, Autohaus asserts

that the jury may infer from the entire course of dealing between it and Saab the existence of the coercion or intimidation necessary to impose liability under the Act and that the Court below erred in rejecting these inferences. Petition, pp. 33-34. First, the opinion of the Court below makes clear that the Court followed the rule that on review of a jury verdict, the prevailing party "is entitled to the benefit of all *reasonable* inferences that may be drawn from its evidence." 567 F.2d at 909. Second, the Court below "searched the entire 1,896 pages of the transcript" and discussed each of the seven areas where Autohaus claims there is evidence that Saab violated the Act. *Id.* at 907, 912-914. Last and most important, the Court below concluded after its exhaustive review of the entire course of dealing between Autohaus and Saab that "the evidence is wholly insufficient to support a reasonable jury's finding in favor of Autohaus on either the breach of contract claim or violation of the Dealers Day in Court Act" (*Id.* at 910.) and that the verdict "if allowed to stand would be a legally unjustified windfall to plaintiff and a miscarriage of justice." *Id.* at 915. What Autohaus fails—or refuses—to appreciate is that the absence of evidence rendered the jury incapable of drawing any inferences supporting the verdict against Saab.

In *American Motors Sales Corporation v. Semke,* 384 F.2d 192 (10th Cir. 1967), the Tenth Circuit affirmed a judgment in favor of a formerly franchised automobile dealer against an automobile manufacturer under the Act by resorting to the same standards of appellate review used by the Ninth Circuit in this case. However, the crucial difference is that the *Semke* Court found ample evidence that the manufacturer had refused to supply the dealer with automobiles unless it ordered unwanted models and that the manufacturer had refused to honor legitimate warranty claims. 384 F.2d at 196-198. In the present case, the opinion below does not hold that the refusal of a manufacturer to honor legitimate warranty claims or to supply automobiles unless unwanted models are also ordered cannot support a violation of the Act. The Court below simply follows the same standards that are used by the *Semke* Court but concludes that there is no evidence to support the jury's finding of a violation of the Act. This hardly qualifies as a conflict of decision meriting review by this Court.

Similarly, in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corporation,* 447 F.2d 786 (5th Cir. 1971), the Fifth Circuit concluded that there was sufficient evidence to support a judgment entered against an automobile manufacturer; the Court found enough proof that the manufacturer's conduct was coercive to justify the award of damages. 447 F.2d at 792-794. Again, the Court below does not rule that Saab conducted itself as did the manufacturer in *York* but still was not subject to liability.

Autohaus next asks this Court to review the evidence anew and compare it to the "closely analogous fact situation" in *Shor-Line Rambler, Inc. v. American Motors Sales Corp.,* 543 F.2d 601 (7th Cir. 1976). Petition, pp. 34-36. Even assuming that the comparison of 1,896 pages of transcript with the six page opinion in *Shor-Line* is valid, Autohaus in the next breath concedes that the existence of coercion or intimidation depends on the circumstances arising in each particular case. Petition, pp. 33-34. What this assumes is that the "facts" in this case are adequately established. They are not.

II. There Is No Important Question of Federal Law

Autohaus implies that since this Court has not reviewed a case arising under the Act, that fact standing alone makes

this case worthy of review. Petition, p. 32. What Autohaus fails to state is why every federal statute merits review by this Court. The Act was promulgated in 1956. Since that time, a well developed body of case law, including the decision below, has provided clear-cut lines of statutory construction and application. This case does not present any deviations from the established statutory norms. Moreover, the Court below relied upon this body of case law in formulating its decision. 567 F.2d at 910-914. This application of well established law to a given set of facts (more accurately an absence of facts) does not amount to an important question of federal law.

III. The Decision Below Is Clearly Correct

In the 26 page long "Statement" section of its Petition, Autohaus intertwines argument and selective characterizations of the record below in an attempt to discredit the decision below. Tunnel vision coupled with overzealous advocacy notwithstanding, the simple fact remains that the Court below "searched the entire 1,896 pages of transcript" in its review of this case. 567 F.2d at 907. It was only after this exhaustive review of the entire record that the Court below reluctantly set aside the jury verdict. *Id.* at 915. At this time in its Brief in Opposition, Saab deems it unnecessary to address each and every argument advanced by Autohaus. However, a review of Autohaus's contentions of error below discloses that each and every argument has been squarely met and refuted in the opinion rendered below.

IV. Valid Alternative and Independent Grounds Exist to Sustain the Decision Below

The Court below not only found that the evidence was wholly insufficient to support the finding of liability, it also stated:

> We would also reverse on the grounds that the evidence is wholly insufficient to support the award of $200,000 in damages. However, since we find no liability, we need not discuss this issue [567 F.2d at 904, fn. 1].

Thus, even if the decision below conflicts with that of another circuit court on an important federal question, a finding by this Court that Saab was in violation of the Act would solve nothing since Autohaus failed to prove its damages.

The opinion below also states:

> We note in passing that the trial court erred when it left the interpretation of the franchise contract up to the jury. The interpretation of a written contract is a question of law for the court to determine. *See* 4 Williston on Contracts § 616, p. 649, et seq. [567 F.2d at 915, fn. 10].

The Court below found that as a matter of law the franchise contract did not continue in effect past September 30, 1972. Autohaus had contended that the franchise contract continued in effect past that date and that Saab's "termination" of the Autohaus dealership on December 20, 1972, constituted a breach of the franchise agreement. Thus, the jury was free to conclude that the franchise contract was still in effect and that Saab had breached it. This was plain error since as found by the Court below, the franchise contract terminated on September 30, 1972. 567 F.2d at 914-915.

V. The Issue Presented Is Well Settled Under Existing Law

Despite Autohaus's contentions to the contrary, the issue before this Court is not whether Saab's proven conduct was a violation of the Act, but rather whether the

Court below utilized the correct standards of appellate review in reversing the jury verdict. The decision below clearly followed settled law when it explicitly set forth the applicable principles in a section entitled "Standard of Review." 567 F.2d at 909-910. What Autohaus fails to keep firmly in mind is the fact that the Court below simply found no evidence of any statutory violations. This is quite different from finding that Saab engaged in a coercive and intimidating course of conduct and yet was still not subject to liability under the Act.

VI. The Court of Appeals Has Already Reviewed the 1,896 Pages of Transcript

As evidenced by Autohaus's 26 page "Statement" section in its Petition, it is asking this Court to undertake an analysis of the particular facts involved in this case. Such a review of the evidence and discussion of specific facts is not the function of this Court and certiorari should be denied. This case contains no important issues nor does it conflict with any decisions. The voluminous transcript has already been reviewed and the task need not be repeated.

VII. Autohaus Did Not Raise the Jury Trial Issue Below

Autohaus makes a last ditch attempt at interjecting a Seventh Amendment issue into this case. However, Autohaus did not urge or brief this issue below and should not be permitted to now raise it for the first time.

Moreover, even if Autohaus's argument were timely it would still not justify a hearing in the present case. As pithily noted by Justice Holmes, the Supreme Court does ". . . not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227

(1925). To be sure, there are exceptions to this general rule, but the present case does not fall within any of those exceptions.

For example, the two decisions (*Tennant v. Peoria & P.U. Railway Co.,* 321 U.S. 29 (1944) and *Lavender v. Kurn,* 327 U.S. 645 (1946)) cited by Autohaus (Petition, pp. 36-37) are part of a group of cases in which this Court granted hearings because of the hostile reception accorded the Federal Employers' Liability Act by the lower courts, a hostility that had resulted in "a great maze of restrictive interpretations [being] engrafted on the Act, constructions that deprived the beneficiaries of many of the intended benefits of the legislation" and in "doubtful questions of fact [being] taken from the jury and resolved by the courts in favor of the employer." *Wilkerson v. McCarthy,* 336 U.S. 53, 69 (and Appendix at 71-73) (1949) (Douglas, J., concurring).

There is no suggestion that the Act at issue in the present case has been the subject of judicial hostility or that it has been systematically eviscerated so as to deprive its intended beneficiaries of their intended benefits.

Likewise, there is no claim that in the present case the Court below considered the case not to be of the *type* which should be decided by a jury. *Cf. Simler v. Conner,* 372 U.S. 221 (1963); *Beacon Theatres v. Westover,* 359 U.S. 500 (1959). And there is no claim that resolution of any of the factual issues in the present case will be determinative of any constitutional issues. *Cf. Berenyi v. Immigration Service,* 385 U.S. 630, 661 (1967).

The present case involves nothing more than a request that this Court reexamine the same facts that the Court below found, for multiple reasons, "to be wholly insufficient

to support either a breach of contract claim or a violation of the Dealers Day in Court Act . . . ." 567 F.2d at 904.

Autohaus has shown no reason why it has any more right to a hearing by this Court than does any other plaintiff whose temporary possession of a "legally unjustified windfall" was rectified by an appellate court.

VIII. Autohaus Did Not Ask for a Rehearing or Rehearing en Banc Below

Rule 40 of the Federal Rules of Appellate Procedure allowed Autohaus to petition for a rehearing before the Ninth Circuit division that heard the case below and to raise "with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." As noted in *National Labor Relations Brd. v. Brown & Root, Inc.*, 206 F.2d 73, 74 (8th Cir. 1953), "[t]he purpose of a petition for rehearing, under the Rules of this Court, is to direct the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result." If Autohaus really believes that the Court below committed such garden variety errors as wholly ignoring the testimony of Autohaus's president (Petition, p. 10) or resolving conflicting testimony (*Id.* at 11) or failing to give credence to permissible inferences (*Id.* at 13), Autohaus should have given the Court below (which was thoroughly familiar with the record) an opportunity to rectify these mistakes before asking this Court to duplicate that effort.

Similarly, if Autohaus really believed that the decision of the panel that decided this case in the Court below was in "Substantial Conflict With The Decision of Other Circuit Courts and With Congressional Intent" (Petition, p. 32),

Autohaus could have sought a rehearing en banc, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, as "necessary to secure or maintain uniformity of its decisions" or urged that this "proceeding involves a question of exceptional importance." *See also United States v. Williams*, 447 F.2d 1285, 1287 (5th Cir. 1971). Autohaus did neither (and offers no explanation for its failure), but now argues that these very grounds exist as reasons for this Court to grant certiorari. Autohaus's leapfrogging of these avenues of redress should not be rewarded by the granting of a hearing in this Court.

IX. The Questions Presented Do Not Affect the Public Interest

This litigation presents no issues of public interest sufficient to elevate it to the status of a case worthy of decision by this Court. The only interests involved are those of the respective litigants.

CONCLUSION

It is difficult to conceive of a poorer candidate than the present case for review by this Court. This case poses no new or novel issues of federal law, breaks no new ground, has minimal precedential value, and is not in conflict with any decision from any other circuit. The only issue in the case is whether Autohaus presented sufficient evidence to warrant submission of its case to the jury. The Court below, after an exhaustive review of the record below, found that Autohaus had not done so. If Autohaus had some quarrel with the manner in which the Court below performed its analysis or with the results reached, it could—and should—have raised its objections via a petition for rehearing, and if Autohaus truely believed the approach taken by the

Court below was in conflict with that followed by other circuits, it could—and should—have raised its claims via a petition for rehearing en banc. Autohaus elected not to pursue either of these remedies, and has instead attempted to conjure up "grounds" justifying review of the case by this Court. Examination of these "grounds" reveals that the case is no more entitled to review by this Court than it was entitled to submission to the jury in the District Court.

For the foregoing reasons, Saab respectfully submits that Autohaus's Petition for a Writ of Certiorari should be denied.

DATED: May 15, 1978.

Respectfully submitted,

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